HAMIT MATUSIN & ORS.

v.

SUPERINTENDENT OF LANDS & SURVEYS & ANOR.

HIGH COURT BORNEO
HAIDAR MOHD. NOOR J
[CIVIL SUIT NOS. 49, 50, 52, 57, 58, 61 OF 1983 & 76 OF 1988]
13 MARCH 1991

NATIVE LAW AND CUSTOM: *Definitions of - Acquisition of - Pre and post 1958 - Opinion as to existence of such custom or right - Memorandum of surrender of customary rights to the State - Implicit recognition of native customary right - Compensation - Payments of rates - Meaning of 'occupation' - Right to part with or transfer the rights - Within the community - Disentitlement - Land Settlement Ordinance (Cap. 28) s. 66 - Land Code (Cap. 81) (Sarawak) ss. 2, 5, 8(e) - Evidence Act 1950, s. 48.*

CIVIL PROCEDURE: *Failure to plead defence - Rules of the High Court 1980, O. 18 rr. 7, 8.*

The seven plaintiffs sought a declaration that they had acquired native customary rights over certain lands (the said lands) in Kampong Dagang, Miri, Sarawak on which the houses claimed by them were situated. In their defence, the defendants alleged that the lands were either owned by a third party or that they were within a river bank reserve.

The plaintiffs argued that the Court should ignore such defence on the ground that they were not pleaded by the defendants, and therefore in breach of O. 18 r. 7 and r. 8 of the Rules of the High Court 1980.

Held:

[1] The non-compliance of O. 18 rr. 7 and 8 is not merely technical but constitutes failure to comply with the cardinal rule of the system of pleadings; as a result the two alleged defences put forward by the defendants are to be disregarded.

[2] The authorities cited in relation to the provisions of the National Land Code 1965 are irrelevant as those provisions are different from the provisions of the Land Code which provide for recognition of native customary rights.

[3] (a) Native customary rights over land is recognised in s. 66 of the Land Settlement Ordinance (the Ordinance) and s. 5 of the present Sarawak Land Code (the Code). Further under s. 5 of the Ordinance native customary rights created prior to 1 January 1958 were left undisturbed;

(b) the defendants also expressly admitted that the plaintiffs were natives professing the Muslim faith, which are basic qualifications to claiming native customary rights over land which they have been occupying.

[4] The use of the memorandum of transfer of customary rights to the State lent weight to the implicit recognition of the native customary rights and it cannot now be alleged that they were used for purely administrative convenience.

[5] There is also unchallenged evidence to show that although the natives had no proprietary rights, they were paid compensation by the state when the state took back these lands on which native customary rights are established.

[6] It is clear that the plaintiffs were in occupation of the houses before they were demolished by the defendants as:

(a) there is oral and documentary evidence which clearly showed that the native customary rights in the houses were properly acquired by them either by way of gift or transfer or occupation;

(b) there is also evidence of the plaintiffs paying rates or effecting repairs or renting out the houses;

(c) the plaintiffs were listed as owners of the houses.

[7] On the evidence, the native customary rights over the said lands can be transferred for value to members of the same community.

[8] Under s. 8(e) of the Code, the renting of the plaintiffs' houses to non-natives does not disentitle the plaintiffs from claiming native customary rights over them.

[Order accordingly; SAR to assess damages.]

Cases referred to:
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ (Rep) 330
Janagi v. Ong Boon Kiat [1971] 2 MLJ 196
Newcastle City Council v. Royal Newcastle Hospital [1959] 1 All ER 736

Legislation referred to:
Evidence Act 1950, s. 48
Land Settlement Ordinance (Cap 28) (Sarawak) s. 66
Rules of the High Court 1980, O. 18 rr. 7, 8
Land Code (Cap 81) (Sarawak) ss. 2, 5, 8(e)

Other sources referred to:
Cross on Evidence (Third Australia Edn.)
Pollock and Wright on Possession

For the Plaintiffs - Sandhu Singh; M/s. M.S. Sandhu & Co.
For the Defendants - Abdul Halim bin Hj. Sabil, Legal Officer of Lands & Surveys

JUDGMENT

Haidar Mohd. Noor J:

The plaintiffs in these seven consolidated suits are claiming the following reliefs:

(1) a declaration that at all times material to these actions the plaintiffs had acquired customary rights over their plots situated at Kampong Dagang, Miri, Sarawak, as more particularly shown and described in annexure A to their statements of claim and were entitled to use and occupy the same;

(2) damages

(3) such further or other relief as the Court may deem fit; and

(4) costs

From the state of the pleadings the central issue for the determination of the Court is:

> Whether at all times material to these actions the plaintiffs had customary rights over the plots of land over which the houses claimed by them were situated?

In the trial the defendants adduced evidence that the lands on which the plaintiffs' houses were situated were in an area which allegedly belonged to Sarawak Shell Oilfield Limited or were within the river bank reserve. The learned Counsel for the plaintiffs submitted that the Court should ignore such defences on the ground that such defences or matters were not so pleaded. He argued that by adducing such evidence, the defendants sought to establish facts which would provide them with a complete defence in law. An examination of the defences filed by the defendants clearly would show that such defences were not so pleaded and in that event the defendants are clearly in breach of O. 18 rr. 7 and 8 of the Rules of the High Court 1980 (RHC). In so far as is relevant, rr. 7(1) and 8(1) of RHC read:

> 7(1) Subject to the provision of this and rr. 10, 11 and 12, every pleading must contain, **and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case maybe,** but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case requires.
>
> 8(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality:
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable; or
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading.
>
> (Emphasis added)

The importance of adhering to the rules of pleadings was stressed by the Supreme Court in *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ (Rep) 330, where Gun Chit Tuan SCJ said at p. 334:

> We would point out that this Court has recently once again stressed the importance of pleadings in *Muniandy & Anor. v. Muhammad Abdul Kader & Ors.* [1989] 2 MLJ 416 at p. 148 in which Mohd. Azmi SCJ stated that:
>
> > Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions v. Hamilton* [1983] 1 AC 191 at p. 233:
> >
> > > Under our adversary system of procedure, for a Judge to disregard the rule by which Counsels are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the Judge, and to be given the opportunity of stating what his answer to it is...

In the present actions the non-compliance of O. 18 is not merely technical but goes to the failure to comply with the cardinal rules of our system of pleadings. In this respect, I would quote a passage from *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196 where Sharma J said:

> The Court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the Court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the Court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

The above passage was quoted with approval by the Supreme Court in *Yew Wan Leong's* case at p. 334.

In the circumstances it is only fair and proper that I should totally disregard the two alleged defences put forward in evidence by the defendants. In that event, as intimated earlier by me, the only issue for determination here is whether or not the plaintiffs had acquired customary rights over the lands on which their houses were situated.

It then becomes necessary for me to consider the law governing customary tenure in Sarawak. Section 66 of the Land Settlement Ordinance (Cap. 28) provides for the recognition of native customary rights, *inter alia*, in respect of "land that has been in continuous occupation or has been cultivated or built on within 3 years". Even the present Land Code (Cap. 81) which came into force on 1 January 1958 gives explicit recognition of native customary rights by s. 5 thereof. In s. 2 of the Land Code "native customary land" means, *inter alia*, "land on which native customary rights, whether communal or otherwise, have lawfully been created prior to 1 January 1958 and still subsist as such". Section 5 would appear to draw a distinction between customary rights created before 1 January 1958 and thereafter. It imposes restrictions on the creation and recognition to such rights after 1 January 1958 while leaving undisturbed the position of native customary rights created prior to the said date. We are here concerned with the situation prior to 1 January 1958. As far back as 1939 the Government *vide* secretariat circular No. 12/1939 stated:

> it is the aim of the Government to record and protect these customary rights and to prevent the various communities from impoverishing themselves by disposing lightly of their rights to others, whether alien or native.

In the present actions it is expressly admitted by the defendants in their defences that all the plaintiffs are natives professing the Muslim faith. It therefore follows that the plaintiffs meet the basic qualification to claim native customary rights though the defendants in their defences denied the plots of lands belonged to the plaintiffs and that they had acquired any native customary rights. In my view this is a matter of evidence for the Court's consideration. In the present actions we are concerned with a Malay community at Kampong Dagang, Miri which was known in 1956 and prior to that as Kampong Brunei (see GN. No. 1667 of 1965 and the evidence of PW1). In considering the claim of native customary rights by the plaintiffs, I have to consider the following:

(a) whether the plaintiffs acquired native customary rights over the lands where their houses were situated.

(b) whether the plaintiffs, if they had such native customary rights, were permitted by native custom to part with them or transfer them to others within the same community. If not, their customary rights are extinguished.

(a) whether the plaintiffs acquired native customary rights over the lands where their houses were situated.

In respect of native custom, s. 48 of the Evidence Act 1950 provides:

> 48. When the Court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence, if it existed, are relevant.

Cross on Evidence (Third Australia Edn.) listed four ways in which the existence of customs or usage may be proved. One of these four methods which is relevant to the present actions, is stated as follows:

The first method consists of the testimony of a witness who deposes, from his own personal knowledge, to the actual existence of custom or usage. He states that he is well aware of the facts that lessees in a given locality have been in the habit of removing "way going crops" that is crops grown by the tenant before the termination of his lease or of any other custom or usage. The evidence may be based on observation of many instances, and it may sometimes be based on reputation or hearsay.

In deciding this issue, the following would appear to be not disputed or challenged in the trial:

(a) The lands over which the plaintiffs claimed native customary rights were situated at Kampong Dagang Miri (also known as Kampong Brunei).

(b) As appears from the memorandum of surrender of customary rights to the State No. 204/1978 (see pp. 17-19 in Exhibit P2) there would appear to be implicit recognition of native customary rights over those lands by the defendants.

(c) Native customary rights claimed over those lands by the plaintiffs were created prior to 1 January 1958 by occupation or building of houses.

(d) The evidence of the Pemanca (PW9) on the native custom.

However, in respect of (b) above the defendants through the evidence of DW1 asserted that the use of the Forms (pp. 17-19 of Exhibit P2) was for administrative convenience and is not a recognition of native customary rights of the plaintiffs. Regrettably, I find it difficult to accept such an assertion for the following reasons:

(i) there are provisions in the Land Code for the recognition of native customary rights and as such the use of the Form (pp. 17-19 of Exhibit P2) lend weight to the implicit recognition of the native customary rights and it cannot now be alleged they were used for purely administrative convenience. The heading of the form reads "Memorandum of Transfer of Customary Rights to the State".

(ii) there is evidence which remained unchallenged to show that some of the natives in Kampong Dagang were given compensation which is in line with the provisions of the Land Code that though the natives have no proprietary rights, that is, no land titles, the natives are entitled to compensation if the State were to take back the lands where native customary rights are established. (see evidence of PW6 and pp. 17-19 of Exhibit P2).

The learned Counsel for the defendants relied heavily on the authorities relating to the provisions of the National Land Code 1965 which provisions are different from the provisions of the Land Code here which provide for the recognition of native customary rights and as such the authorities are irrelevant for the purpose of the present actions.

It remains for me to consider whether the plaintiffs had acquired native customary rights as they claimed. It is not disputed that the plaintiffs by way of oral and documentary evidence clearly showed that the native customary rights in the houses were properly acquired by them either by way of a gift or transfer or occupation. Though there could be problems of recollecting certain events of what happened many years ago by the plaintiffs but whatever shortcomings, in my view, are not really material to discredit their evidence. We have evidence of the plaintiffs paying rates to the Miri District Council (see pp. 49 to 54 of Exhibit P1) or effecting repairs or renting them out to others until their houses were demolished. Further the defendants issued notices to the plaintiffs (see pp. 1 to 6 of Exhibit P1) and then allocated houses to them in the settlement scheme at Piasau Link. From the Survey Job No. 210/79

conducted in 1979, the plaintiffs were listed as owners of the houses (see p. 8 of Exhibit P3). Surely, all these would show clearly that the plaintiffs were in occupation of the houses before they were demolished by the defendants. The defendants cannot now say that they do not recognise the plaintiffs as in occupation of those houses. The meaning of the word 'occupation' was given by Lord Denning in *Newcastle City Council v. Royal Newcastle Hospital* [1959] 1 All ER at p. 736 as follows:

> Occupation is a matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering: see *Pollock and Wright on Possession*, pp. 12, 13. There must be something actually done on the land, not necessarily on the whole but on part in respect of the whole. No one would describe a bombed site or an empty unlocked house as "occupied" by anyone, but anyone would say that a "farmer" occupies the whole of his farm even though he does not set foot on the woodlands within it from one year's end to another.

By analogy therefore if the plaintiffs were to rent out the houses it does not mean that they are no longer in control of those houses or dispossessed themselves of the right to occupy those houses.

(b) whether the plaintiffs, if they had such native customary rights, were permitted by native customs to part with them or transfer them to others within the same community. If not, their customary rights are extinguished.

We have the evidence of PW1 and PW6 regarding how the transfers were effected with the help of the Ketua Kampong and the District Officer as well. (see p. 45 of P1 on the deed of transfer). Pemanca Abdul Rahim bin Haji Hamzah, (PW9) was called as a witness by the plaintiffs on native custom. He testified that members of Kampong Dagang community were allowed to sell and transfer their native customary rights over their houses provided they were sold to persons within the community. He went on to explain that the parties had to see the Ketua Kampong to discuss the matter. They also had to see the District Officer and sign a document to be prepared at the District Office. PW9 was a resident of Kampong Dagang for about 40 years and his evidence was not discredited or challenged in cross-examination. The defendants did not call any witness to rebut the evidence of PW9 either. Therefore I hold that the native customary rights over the lands at Kampong Dagang can be transferred for value to members of the same community.

The next issue I have to consider is whether the renting of the houses to non-natives would disentitle the natives to claim native customary rights (see evidence of PW1 and PW2). The short answer to this is provided by s. 8(e) of the Land Code (Cap. 81) which reads:

> that the rights and privileges of any native shall not be adversely affected by any agreement to which (b) applies.

Paragraph (b) reads:

> any agreement, purporting to transfer or confer any such rights or privileges or which would result in such person enjoying any such right or privilege, shall be deemed to have been entered into for an illegal consideration; and in particular but without prejudice to para. (d), any consideration which shall have been paid or furnished shall not be recoverable in any Court nor shall any relief be afforded to any person claiming that any consideration promised has not been paid or furnished.

It would seem clear therefore that the plaintiffs' customary rights in such a situation are not adversely affected or to put it in another way, not extinguished.

In a nutshell, it would appear to me that the defendants practised double standards in respect of those people who claimed native customary rights in Kampong Dagang where certain people were given compensation but the plaintiffs were deprived of the same for reasons best known to the defendants. From the oral and documentary evidence, the plaintiffs, in my view, had discharged the burden of proof on a balance of probability that they had acquired customary rights over the plot of lands at Kampong Dagang on which their houses were situated and they were not duly compensated as provided by law when the defendants took back possession of the lands and their houses were demolished. In the premises I would accordingly grant the relief as prayed in prayer (a) of their statements of claim. As for the claim for damages I order that the Senior Assistant Registrar do assess the damages on a date to be fixed. I also order that the plaintiffs be awarded the costs of the proceedings to be taxed, unless agreed.

Also found at [1991] 2 CLJ 1524